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ALAN MICHAEL ROZARIO

v.

MERBOK MDF SDN BHD

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COURT OF APPEAL, PUTRAJAYA
KN SEGARA JCA
ABU SAMAH NORDIN JCA
ABDUL WAHAB PATAIL JCA
[CIVIL APPEAL NO: W-02-444-2007]

C

5 JULY 2010

CONTRACT: *Illegality - Corruption - Consultancy agreement for appointment of consultant to secure a contract with third party and to pay consultant a fee if contract is successfully secured - Whether purpose of*

D

agreement is to offer bribe - Whether consultancy agreement illegal - Whether null and void and unenforceable

LEGAL PROFESSION: *Practice of law - Partnerships between solicitors - Partners in charge of separate branches - Partners in a firm*

E

jointly and severally liable for acts of each other executed in course of their vocation - Whether act done in course of firm's business - Subjective intention of partners irrelevant

LEGAL PROFESSION: *Stakeholder - Duty to return stakeholder monies - Failure by legal firm to return stakeholders monies upon*

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cancellation of intended transaction - Whether partners in breach of undertaking to return stakeholder monies - Whether letter of undertaking a forgery - Whether payee entitled to return of stakeholder monies

PARTNERSHIP: *Liabilities of partners - Legal firm - Partners in a firm*

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jointly and severally liable for acts of each other executed in course of their vocation - Partnership Act 1961

The 1st defendant and the 2nd defendant/appellant were partners of a legal firm known as Shuhaiza & Partners ('the firm'). The

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plaintiff/respondent claimed against the firm for return of the sum of RM1 million ('Stakeholders Money') which the firm was holding as stakeholder. By an agreement ('Consultancy Agreement') made between the plaintiff and the 3rd defendant, it was agreed that the 3rd defendant would, in consideration of a fee ('Consultancy Fee'),

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act as plaintiff's consultant and facilitate the execution of an agreement ('Direct Agreement') between the plaintiff and a third

party. For this purpose, the plaintiff deposited the Stakeholders Money into the firm's clients' account. The Stakeholders Money was to be released to the 3rd defendant on account of the Consultancy Fee if the Direct Agreement was executed. By a letter dated 3 July 2004 ('Letter of Undertaking'), the firm confirmed their agreement to act as stakeholders in respect of the Stakeholders Money and undertook to refund the Stakeholders Money to the plaintiff if the Direct Agreement was not executed by the agreed date. The Direct Agreement was not executed. However, in breach of the Letter of Undertaking, the firm failed to remit the Stakeholders Money to the plaintiff. In a statutory declaration, the 1st defendant admitted that she was wholly to account for the RM1 million and attempted to absolve and exonerate the 2nd defendant of any wrong doing over the Stakeholders Money. The High Court granted summary judgment against the 1st and 2nd defendants for the refund of the RM1 million. The 2nd defendant appealed against this decision on the grounds that: (i) the 1st defendant had admitted that the 2nd defendant was not involved in the matter; (ii) the 2nd defendant was protected under s. 12 of the Partnership Act 1961 ('PA') as the transaction was not carried out in the ordinary course of the business of the firm; (iii) the Consultancy Agreement was invalid and that the 1st defendant in misappropriating the Stakeholders Money was in breach of s. 15 of PA; and (iv) the Letter of Undertaking was a forgery.

Held (dismissing the appeal with costs)
Per KN Segara JCA:

(1) The allegation of forgery was nothing but a bare attempt to sculpt and provide a triable issue. The appellant could not in one breath seek to rely upon the 1st defendant's statutory declaration for his benefit, and in the next breath say that the Letter of Undertaking, consistent with the receipt of the Stakeholder Money after its issue, was a forgery. The allegation of forgery was not a *bona fide* triable issue. (para 7)

(2) The allegation that the 2nd defendant was not an equity partner of the main branch of the legal firm and that he had no knowledge of the matter, did not absolve him in law, under the PA, of his liability as a partner of the firm at the material time. The 2nd defendant's obligation and liability to the plaintiff under the Letter of Undertaking was pursuant to his being a

partner of the firm and not his knowledge or express authorization of it. There was a breach of the stakeholder arrangement and the firm's undertaking. The 2nd defendant could not escape joint and several liability with his partner at the time the Letter of Undertaking was given. (paras 20-22)

(3) The plaintiff had entered into a perfectly legal agreement with the 3rd defendant. There is nothing illegal to employ another to secure a contract with the third party and to pay him a fee if he could successfully secure it – much like a housing agent procuring a sale of a house to a buyer. (para 23)

(4) There were no triable issues of law or fact. The 2nd defendant had not raised any *bona fide* defence to warrant a trial. (para 25)

Bahasa Malaysia *Translation Of Headnotes*

Defendan pertama dan defendan/perayu kedua adalah pekongsi sebuah firma undang-undang yang dikenali sebagai Shuhaiza & Partners ('firma'). Plaintif/responden menuntut terhadap firma bagi pemulangan jumlah RM1 juta ('Wang Pemegang Amanah') yang firma memegang sebagai pemegang amanah. Melalui suatu perjanjian ('Perjanjian Perunding') yang dibuat di antara plaintif dan defendan ketiga, ia telah disetujui bahawa defendan ketiga akan, sebagai balasan sesuatu fi ('Fi Perunding'), bertindak sebagai perunding plaintif dan memudahkan pelaksanaan suatu perjanjian ('Perjanjian Terus') di antara plaintif dan satu pihak ketiga. Untuk tujuan ini, plaintif memasukkan Wang Pemegang Amanah ke dalam akaun klien-klien firma. Wang Pemegang Amanah sepatutnya dilepaskan kepada defendan ketiga berdasarkan Fi Perunding jika Perjanjian Terus dilaksanakan. Melalui surat bertarikh 3 Julai 2004 ('Surat Akujanji'), firma mengesahkan persetujuan mereka untuk bertindak sebagai pemegang amanah berhubungan dengan Wang Pemegang Amanah dan memberi akujanji untuk memulangkan Wang Pemegang Amanah kepada plaintif jika Perjanjian Terus tidak dilaksanakan sebelum tarikh yang telah disetujui. Perjanjian Terus tidak dilaksanakan. Walau bagaimanapun, dalam melanggari Surat Akujanji, firma gagal untuk meremit Wang Pemegang Amanah kepada plaintif. Dalam suatu deklarasi statutori, defendan pertama mengaku bahawa beliau bertanggungjawab sepenuhnya bagi RM1 million dan cuba membebaskan dan melepaskan defendan kedua dari

apa-apa kesalahan atas Wang Pemegang Amanah. Mahkamah Tinggi membenarkan penghakiman terus terhadap defendan-defendan pertama dan kedua bagi pemulangan RM1 juta. Defendan kedua merayu terhadap keputusan tersebut atas alasan-alasan bahawa: (i) defendan pertama telah mengaku bahawa defendan kedua tidak terlibat dalam perkara tersebut; (ii) defendan kedua dilindungi di bawah s. 12 Akta Perkongsian 1961 ('AP') disebabkan transaksi tidak dilaksanakan dalam perjalanan urusan biasa firma; (iii) Perjanjian Perunding adalah tidak sah dan defendan pertama dalam melesapkan Wang Pemegang Amanah telah melanggar s. 15 AP; dan (iv) Surat Akujanji adalah suatu pemalsuan.

Diputuskan (menolak rayuan dengan kos)
Oleh KN Segara HMR:

(1) Pengataan pemalsuan hanya merupakan suatu percubaan untuk membentuk dan menyediakan sesuatu isu yang boleh dibicara. Perayu tidak boleh sekaligus cuba mengharapkan deklarasi statutori defendan pertama untuk menyokongnya, dan kemudian mengatakan bahawa Surat Akujanji, yang konsisten dengan penerimaan Wang Pemegang Amanah selepas pengeluarannya, adalah suatu pemalsuan. Pengataan pemalsuan tidak merupakan suatu isu bona fide yang boleh dibicarakan.

(2) Pengataan bahawa defendan kedua bukan pekongsi ekuiti cabang utama firma undang-undang dan bahawa beliau tidak mempunyai apa-apa pengetahuan tentang perkara tersebut, tidak membebaskannya dalam undang-undang, di bawah AP, dari tanggungjawabnya sebagai pekongsi firma pada masa material itu. Obligasi dan tanggungjawab defendan kedua kepada plaintif di bawah Surat Akujanji adalah menurut pada beliau menjadi pekongsi firma dan bukan pengetahuan atau pemberian kuasa nyata beliau tentangnya. Terdapat suatu pelanggaran pengaturan pemegang amanah dan akujanji firma. Defendan kedua tidak dapat melepasi tanggungjawab bersesama dan berasingan dengan pekongsinya pada masa Surat Akujanji telah diberikan.

(3) Plaintif telah memeterai satu perjanjian yang sah di sisi undang-undang dengan defendan ketiga. Tidak ada apa-apa yang menyalahi undang-undang untuk menggaji seseorang untuk mendapatkan suatu kontrak dengan pihak ketiga dan untuk membayarnya fi jika beliau berjaya mendapatkannya – seperti seorang agen rumah yang memperolehi jualan sebuah rumah kepada seorang pembeli.

A **(4)** Tiada apa-apa isu undang-undang atau fakta yang boleh dibicarakan. Defendan kedua tidak menimbulkan apa-apa pembelaan *bona fide* untuk mewajarkan suatu perbicaraan.

Legislation referred to:
B Partnership Act 1961, ss. 12, 13, 14, 15

For the appellant - M/s Rajadevan & Assoc
For the respondent - M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Suit No: D8-22-977-2005]

C *Reported by Amutha Suppayah*

JUDGMENT

D **KN Segara JCA:**

[1] Shuhaiza binti Shuib and Alan Michael Rozario were the only two partners of the legal firm known as Shuhaiza & Partners at all material times, carrying on the business of advocates and solicitors.

E **[2]** Merbok MDF Sdn Bhd's claim against the legal firm of Shuhaiza & Partners is for the return of the sum of RM1 million which the firm was holding as stakeholder pending the execution of an agreement.

F **[3]** On 17 May 2007 the High Court granted summary judgment against Shuhaiza binti Shuib (1st defendant) and Alan Michael Rozario (2nd defendant) for the refund of the RM1 million.

[4] The High Court Judge found *inter alia*;

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> By failing to return the money retained by the firm as stakeholder the 1st and 2nd defendants as partners of the firm were in breach of the undertaking to do so. The plaintiff is therefore entitled to its return.

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> A partner in a firm is jointly and severally liable for the act of the other executed in the course of their vocation that they had undertaken to pursue.

> There is no triable issue in the plaintiff's claim that ought to go for trial.

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[5] The 1st defendant has not appealed against the summary judgment. A

[6] The 2nd defendant (the appellant before us) is however dissatisfied against the summary judgment entered against him and has alleged that the High Court Judge has failed to appreciate: B

(a) that the 1st defendant in her letter dated 21 July 2005 had admitted that the 2nd defendant was not involved in the matter;

(b) that the 2nd defendant is protected under s. 12 of the Partnership Act 1961 as the transaction was not carried out in C the ordinary course of the business of the firm;

(c) that the Consultancy Agreement is invalid and that the 1st defendant in misappropriating the stakeholders money was in breach of s. 15 of the Partnership Act 1961; D

(d) that the letter of undertaking is a forgery.

[7] We do not accept that the allegation that the High Court Judge had failed to appreciate that the letter of undertaking was a forgery warrants a trial. In the light of the findings by the judge on E the evidence before the court, it is manifestly clear that the allegation of forgery is nothing but a bare attempt to sculpt and provide a triable issue. The Stakeholders' Money would not have been paid to Shuhaiza & Partners without it first having issued the letter of undertaking. The appellant cannot in one breath seek to F rely upon the statutory declaration for his benefit, and in the next breath say that the letter of undertaking, consistent with the receipt of the Stakeholder Money after its issue, is a forgery. In our view the allegation of forgery is not, in the circumstances, a *bona fide* triable issue. G

[8] We have perused through all the affidavits and documentary evidence that were before the High Court Judge. We are unanimous that there are no merits in this appeal before us and that there are no *bona fide* triable issues or defence on merits to warrant a trial on H the assertions made by the appellant (hereinafter referred as the 2nd defendant).

[9] The plaintiff's claim is based on a breach of undertaking, primarily by the 1st defendant and, as against the 2nd defendant, by I relying on ss. 12, 13, and 14 of the Partnership Act 1961 which reads as follows:

12. Liability of firm for wrongs

Where, by any wrongly act or omission of any partner acting in the course of the business of the firm or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or penalty is incurred, the firm is liable therefore to the same extent as the partner so acting or omitting to act.

13. Misapplication of money or property received for or in custody of firm

In the following cases, namely:

(a) where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it; and

(b) where a firm in the course of its business receives the money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss.

14. Liability for wrongs joint and several

Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under section 12 or 13.

[10] By an agreement dated 3 July 2004 (Consultancy Agreement) made between the plaintiff (Merbok MDF Sdn Bhd) and the 3rd defendant (Syahrizan Winardy bin Rusli) it was agreed, *inter alia*, that the 3rd defendant would, in consideration of a fee (Consultancy Fee), act as plaintiff's consultant and facilitate the execution of an agreement (Direct Agreement) between the plaintiff and Lembaga Kemajuan Kelantan Selatan (KESEDAR), for the sale of rubber trees in the Gua Musang area in Kelantan for a period of at least 15 years.

[11] Pursuant to cl. 4(b)(i) of the Consultancy Agreement, the plaintiff was to deposit with Shuhaiza & Partners, as stakeholders, the sum of RM1million (Stakeholders Money). Clause 4(b)(i) of the Consultancy Agreement states that:

> … Merbok shall no later than two (2) Business Days from the date of execution of this Agreement (by the party who signs last) deposit or procure the deposit with Messrs Shuhaiza & Partners, Advocates and Solicitors, of Suite 20.6 Plaza 138, Jalan Ampang, 5050 Kuala Lumpur (the "Stakeholders") of the sum of RM1,000,000 (ringgit Malaysia one Million Only) …

[12] On 6 July 2004 Merbok deposited the Stakeholders Money into Shuhaiza & Partners' clients account with Bank Islam Malaysia Berhad in accordance with cl. 4(b)(i) of the Consultancy Agreement.

[13] This sum was intended to be released to the 3rd defendant on account of the Consultancy Fee if the Direct Agreement was executed on or before 15 September 2004 (Cut-Off Date). If the Direct Agreement was not executed, the 3rd defendant was to unconditionally agree and undertake to refund and/or procure the refund and payment to the plaintiff of the Stakeholders money within three days of the Cut-Off Date. However, by supplemental agreements dated 14 September 2004 and 4 October 2004 (Supplemental Agreements) executed by the plaintiff the Cut-Off Date was extended to 7 November 2004 (Extended Cut-Off Date).

[14] By a letter dated 3 July 2004 (Letter of Undertaking), Shuhaiza & Partners confirmed their agreement to act as stakeholders in respect of the Stakeholders Money and undertook to refund the Stakeholders Money to the plaintiff if the receipt of the Direct Agreement did not occur on or before the agreed date. The Letter of Undertaking is very crucial in determining and attaching liability on the partners of the legal firm, in the factual matrix of the plaintiff's claim and, in particular, the appellant before us. Therefore, we reproduce it almost verbatim for easy comprehension.

> Shuhaiza & Partners
> ADVOCATES & SOLICITORS
>
> Merbok MDF Sdn Bhd
>
> …
>
> Attn: **Mr Robert Kokshorn**
>
> **Re: Stakeholder Undertaking**
>
> **Deposit of RM1,000,000-00 pursuant to the Consultancy Fee Agreement dated 3rd July, 2004 between Merbok MDF Sdn Bhd**

A We refer to the sum of RM1,000,000-00 Merbok MDF Sdn Bhd ("Merbok") to be deposited with us by Tuesday 6th July, 2004 pursuant to Clause 4 b (i) of the Agreement (the "Stakeholders Money").

B We hereby confirm our agreement to act as stakeholders in respect of the Stakeholders Money and irrevocably and unconditionally agree and undertake to deal with the same as follows:

(i) to only release the Stakeholders Money to Syahrizan Winardy Bin Rusli ('SWR") as soon as practicable after but no later than seven (7) Business Days after receipt by us from you Merbok, of a signed copy of the Direct Agreement which has been executed by Merbok and KESEDAR (the "Receipt") as soon as reasonably practicable after the Receipt we shall notify Merbok's solicitors, M/s Shook Lin & Bok, of such receipt (both as defined in the Agreement); we shall also and hereby agree and undertake to procure from SWR a written acknowledgement of receipt of the Stakeholder Money at the time of release of the same to him and shall forward a copy of the acknowledgement of receipt by SWR to Merbok's solicitors immediately thereafter; and

(ii) to refund the Stakeholders Money to Merbok if the Receipt of the Direct Agreement does not occur on or before 15 September 2004 or such later date as Merbok may notify us in writing of the same and such refund shall be made within Three (3) days from the date thereof.

We shall and hereby irrevocably and unconditionally agree and undertake to, at all times, act strictly in accordance with the terms of this Letter in respect of the Stakeholders Money and shall not deviate there from unless otherwise directed/authorized in writing by Merbok/SWR.

We further irrevocably and unconditionally agree and undertake to indemnify Merbok and hold Merbok harmless from any and against any damages, deficiencies, losses, costs, liabilities and expenses (including legal fees and disbursements) resulting directly or indirectly from or arising out of any breach by us of our obligations hereunder and/or under your letter of instructions.

…

….

SHUHAIZA & PARTNERS

cc Clients
Messrs Shook Lin & Bok

[15] The Direct Agreement was not executed either before the Cut-Off Date or the Extended Cut-Off Date, that is, 7 November 2004.

[16] In breach of the Letter of Undertaking, Shuhaiza & Partners failed to remit the stakeholders Money to the plaintiff. The legal firm should have refunded the Stakeholders Money in the sum of RM1,000,000 to Merbok on or about 10 November 2004, in accordance with the Letter of Undertaking. However, the legal firm failed to do so. Thereafter, by a letter dated 2 June 2005 to Merbok (and copied to the legal firm Shuhaiza & Partners), Syahrizan Winardy bin Rusli (3rd defendant):

(a) confirmed that the Stakeholders Money is due and payable to Merbok and

(b) stated that he had instructed the legal firm to remit the Stakeholders Money back to Merbok immediately.

[17] This was followed by a letter of even date from Syahrizan Winardy bin Rusli to the legal firm instructing it to remit the Stakeholders Money back to Merbok immediately. Despite all the aforesaid letters, the legal firm of Shuhaiza & Partners failed or refused to remit the Stakeholders Money back to Merbok.

[18] In a statutory declaration, dated 21 July 2005, the 1st defendant confirmed receipt of the Stakeholders Money and admitted withdrawing the same from the clients' account of Shuhaiza & Partners. The statutory declaration reads:

1. I am an Advocate & Solicitor of the High Court of Malaya and practicing at Kuala Lumpur under the name and style of Messrs Shuhaiza & Partners Advocates & Solicitors of No …

2. The facts deposed to herein are within my personal knowledge.

3. I have on 06-07-2004 acknowledge receipt of the sum of RM1 Million on behalf of Messrs Shuhaiza & Partners from Merbok Sdn Bhd.

4. I then deposited the said sum of RM1 Million into the Bank Islam Client's A/C No … of Messrs Shuhaiza & Partners.

5. I admit on withdrawing and disbursing the said sum of RM1 Million on various occasions.

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6. I also admit my Partner Alan Michael Rozario had no knowledge of the sum deposited and was not even a signatory to the said account.

7. I further admit that I have on various occasion withdrew and used money from the various client's account belonging to Messrs Shuhaiza & Partners which my partner has no knowledge of and not a signatory.

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8. I hereby admit that I am solely responsible for all the withdrawal of all the Client's Account and that Mr Alan Michael Rozario has no knowledge whatsoever in all the above transaction.

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[19] Notwithstanding the statutory declaration of the 1st defendant admitting that she is wholly to account for the RM1 million, and attempting to absolve and exonerate the 2nd defendant of any wrong doing over the Stakeholders Money, it is undisputed that when the Stakeholders Money was paid into the account of Shuhaiza & Partners and subsequently withdrawn, the 2nd defendant was a partner of the legal firm.

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[20] We are unanimous that the allegation that the 2nd defendant was not an equity partner of the main branch of the legal firm and that he had no knowledge of the matter, does not absolve him in law, under the Partnership Act 1961, of his liability as a partner of the firm of Shuhaiza & Partners, at the material time.

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[21] The 2nd defendant's obligation and liability to the plaintiff under the Letter of Undertaking is pursuant to his being a partner of Shuhaiza & Partners and not his knowledge or express authorization of it. There is no dispute the Letter of Undertaking was issued by Shuhaiza & Partners. The legal firm had acted on the letter of undertaking and accepted the monies as stakeholders.

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[22] There can be no dispute that there has been a breach of the stakeholder arrangement and the legal firm's undertaking. We are unanimous that the 2nd defendant cannot escape joint and several liability with his partner/s at the material time the Letter of Undertaking was given. His civil liability to the plaintiff is distinct and separate from any criminal consequences or disciplinary action under the Legal Profession Act 1976, for which he may have an answer, based on the statutory declaration of the 1st defendant.

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[23] We entirely agree with the High Court Judge's finding that:

> The plaintiff had entered into a perfectly legal agreement with the 3rd defendant. There is nothing illegal to employ another to secure a contract with the third party and to pay him a fee if he could successfully secure it – much like a housing agent procuring a sale of a house to a buyer.

[24] We further agree with the High Court Judge when he ruled:

> In determining whether the act of the firm was done in the course of the business of the firm one need not look behind what the first defendant and the 3rd defendant had in mind when they entered into the consultancy agreement. Intention is irrelevant – for even 'the devil knows not what the mind thinks'. All that one would have to judge is whether the agreement prepared by the 1st defendant was on the face of it done in the course of the business of the firm. There could be no doubt that the preparation of an agreement was within the course of the business of the legal firm of Shuhaiza & Partners.
>
> It follows therefore that the defendants' submission that the act of the 1st defendant partner having been performed with an ulterior motive of being bribed to an official of KESEDAR is irrelevant.

[25] We are unanimous that there are no triable issues of law or fact. The 2nd defendant has not raised any *bona fide* defence to warrant a trial.

[26] In the upshot, the appeal is dismissed with costs fixed at RM5,000. The decision of the High Court is affirmed.